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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~937~~ 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 12, 1960

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Tampa Electric Company[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 4, 1960 in a proceeding entitled *Tampa Electric Company v. Nashville Coal Company, et al.*

Opinions Below

The opinions of the United States Court of Appeals for the Sixth Circuit are printed as Appendix A hereto. They have not yet been officially reported. The opinion of the

1. Referred to herein as "petitioner" or "buyer".

United States District Court for the Middle District of Tennessee, Nashville Division, rendered on November 18, 1958, is printed as Appendix C hereto. It is officially reported at 168 F. Supp. 456.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

Question Presented

Can a seller which has entered into a contract to furnish a limited and defined portion of an electric utility company's fuel requirements for a period of 20 years at a designated price, which was economically necessary to and desired by both parties at the time it was entered into, and which the purchaser now wishes to enforce, repudiate its obligations on the alleged ground that the contract violates Section 3 of the Clayton Act?

Statute Involved

Section 3 of the Clayton Act; 15 U.S.C. § 14:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or under-

standing that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3, 38 STAT. 731.

Statement

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, which granted respondents' motion, and denied petitioner's cross-motion, for summary judgment. The action, which was commenced by petitioner on September 3, 1957, sought a declaratory judgment that a contract dated May 23, 1955 to supply coal to petitioner, which had been repudiated by respondents, was valid and enforceable. The basis for federal jurisdiction in the District Court was 28 U.S.C. §§ 1332[2] and 2201. The plaintiff, Tampa Electric Company, was (and is) a Florida corporation; defendant Nashville Coal, Inc., a Kentucky corporation; defendant West Kentucky Coal Company, a New Jersey corporation; and defendant Nashville Coal Company, a Tennessee corporation until its dissolution in 1956. In addition to this diversity of citizenship between the plaintiff and each of the defendants, the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.

2. 62 STAT. 930 (1948), *as amended by* 70 STAT. 658 (1956).

In their answer before the District Court, respondents admitted the execution of the contract and their refusal to perform their obligations thereunder, but alleged that the contract was void and unenforceable on the ground that it violated Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Thereupon respondents filed a motion for summary judgment, and petitioner filed a cross-motion seeking the same relief. District Judge William E. Miller granted respondents' motion for summary judgment, and denied petitioner's cross-motion, on the ground that the material facts were not in dispute and established the illegality of the contract under Section 3 of the Clayton Act. The Court thereupon entered judgment declaring the contract illegal, void and unenforceable. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court (Weick, J. dissenting).

Facts

Since there is no dispute as to the facts, and they are clearly and succinctly set forth in the majority's opinion below, we believe it would be a convenience to the Court if we adopt that statement as our own:

> "Appellant [petitioner] is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees [respondents] are engaged in mining and selling coal.
>
> "In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

"The May 23, 1955, contract [the contract at bar] was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract.

"The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

"'Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of deter-

mining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed.'

It also provided,

"'The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer.'

"The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The third unit, a coal burning unit, was under construction at the time this action was filed.

"For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

"In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

"In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

'To increase as required to about 2,250,000 tons per year.'

"At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year" (App. 2a-4a).[3]

One further fact should be noted. It was conceded by respondents in the Courts below that Potter Towing Company, the original contractor, which was but one of some 700 coal producers who were not only able but "eager" to supply petitioner's requirements, had no such economic leverage vis-a-vis petitioner as to enable it to insist upon the "requirements" provision (R. 57a, R. 1b). Obviously if petitioner had not desired that provision, it could have purchased its coal on other terms from any one of Potter's competitors. Actually, respondents have asserted that it was petitioner, the purchaser, and not respondents which had the economic leverage to insist on that provision (R. 57a).

Decision of the Court of Appeals

The majority of the Court below sustained the District Court, holding that the contract violated Section 3 of the Act and was therefore unlawful and unenforceable by either the buyer or the seller. As we read the opinion, the Court based its decision solely on the facts that the

3. The following references will be used herein:
App. — Appendices to this petition.
R.-a — Record as printed in appendix to appellant's brief in Court below.
R.-b — Record as printed in appendix to appellees' brief in Court below.

contract used the word "requirements" and that the quantity of coal involved in the contract would soon exceed the total amount of coal presently being sold in the State of Florida, and amounted in dollar value, over the life of the contract, to over $128,000,000. Accordingly, citing this Court's decision in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949) (*"Standard Oil"*), the Court held that the amount involved in the contract was "not insignificant or insubstantial" and that the contract was therefore void (App. 11a).

The Court dismissed the contention that it was plain from its legislative history that the Act was intended to apply only to practices whereby powerful sellers imposed exclusive dealing or "tying" conditions upon a substantial number of buyers for the purpose and with the effect of tying up a substantial portion of the market for the sale of their goods, on the ground that the Act in unambiguous terms referred to "a" contract of sale for "use, consumption or resale" and that this Court had held in *Standard Oil* that the Act was "applicable to a situation where the seller did not occupy a dominant economic position in the industry" (App. 5a, 6a).

Again citing *Standard Oil*, the Court held that it was immaterial that the contract contained no condition that the purchaser would not deal in the goods of the seller's competitors, since the contract did require the seller to supply the buyer's "'total requirements' for the first two coal burning units and for such other units of the Gannon Station as would be constructed as coal burning units" (App. 7a). The Court dismissed as immaterial the fact that under the contract the purchaser could, and in fact did, purchase oil, concededly a "competitive" fuel, on the ground that oil and coal are "separate defined subdivision[s] of the fuel industry generally" (App. 9a). Similarly, the Court disregarded the allegedly "remote"

possibility that the buyer might convert some of its oil burning units and purchase coal for these units from the seller's competitors, since "there is nothing to indicate that there is any planned or probable conversion" (App. 9a). Finally, citing this Court's opinion in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), the Court held that since the contract was void, the Court "will not assist either party in its enforcement" (App. 13a).

In his carefully reasoned, and, we submit, completely sound dissent, Judge Weick took issue with the majority on every point (App. 13a-35a).

Reasons for Granting the Writ

As we read the Act, its statutory history, and the Court decisions construing and applying it, it is indisputable that it was designed and has heretofore been construed solely to prohibit various devices whereby powerful sellers, through the economic leverage derived from their control of a desirable and unique product, attempt to pre-empt the market for their product by selling it only on the condition that the purchaser will not deal in the goods of the seller's competitors. But the decision below has converted the Act into a statute outlawing any contract whereby a manufacturer contracts for the supply of a part of its requirements of fuel, raw materials or other necessities for a term of years whenever the quantity of goods involved is not insubstantial. Specifically, we submit that the decision below is unprecedented and erroneous in the following respects:

1. This is the first time the Act has been applied to a contract for the sale of a limited portion of a buyer's requirements, which neither expressly nor in effect prohibits the purchaser from dealing in the goods of the seller's competitors.

2. This is the first time the Act has been applied when it was conceded that the seller had no economic leverage enabling it to impose an exclusive dealing condition upon the buyer, and where, concededly, it did not do so.

3. This is the first time the Act has been applied to an isolated contract for the sale of a part of the requirements of one of many thousands of potential customers of the seller and its competitors.

4. This is the first time it has been held that the effect of a contract for the sale of goods may be to substantially lessen competition or tend to create a monopoly when the actual effect of the contract was to introduce competition with an existing monopoly and compel it to reduce its prices.

5. This is the first time it has been held that the sole criteria of illegality under Section 3 are that the contract uses the word "requirements" and that the volume of goods involved is substantial.

6. This is the first time a seller has been permitted to avoid its contractual obligations on the alleged ground that it has itself violated the Act. In this respect the decision below is in direct conflict with the almost contemporaneous decision of the United States Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959).

7. An examination of the opinion below will further disclose that each of the above propositions is said to be supported by the decision of this Court in *Standard Oil*. In our view, the Court below has completely misconstrued this Court's opinion in that case.

We respectfully submit that the propositions established by the decision below are so novel, and so drastic

in their potential effect on the business and economic life of the country, that it is in the public interest that this Court review that decision now, and thus put at rest the many doubts which it casts on the meaning and effect not only of the Act itself but of this Court's decision in *Standard Oil*. For in effect the decision below outlaws, or at least raises the gravest questions as to the legality of, any contract for the purchase or sale of a substantial volume of goods over a term of years. If that be the law, the wheels of industry in this country will be quickly brought to a standstill.

ARGUMENT

I

The contract at bar does not come within the language of Section 3 of the Clayton Act.

As is clear on its face, and is conceded by the majority below, the contract at bar does not contain any "condition, agreement or understanding" that the buyer will not use or deal in the goods of the seller's competitors. The majority below contends, however, that this is immaterial, since the contract covers the buyer's "'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" (App. 7a).

We submit that this proposition is manifestly untenable. For concededly the buyer is free at all times to buy coal, oil or any other fuel from the seller's competitors for use in any of the 11 presently oil burning units at the buyer's two other integrated stations on Tampa Bay, or in any new plant it may elect to construct. Furthermore, if the demands for additional electricity require the buyer to construct additional units at Gannon Station itself, the buyer is free to burn oil, gas or any other competitive fuel in such units. It is only if the buyer determines to con-

struct additional coal burning units at Gannon during the first ten years that the contract requires it to purchase its additional coal requirements from respondents. After ten years, the buyer is free to purchase coal from the seller's competitors even for use in any additional coal burning units thereafter constructed at Gannon.

The majority below sought to meet these incontrovertible facts first by asserting that there was no present plan for the conversion of any oil burning units to coal, and that therefore the exercise of petitioner's right to purchase coal from the seller's competitors for such units was so "remote" as to be "immaterial" (App. 9a). The significance of this assertion escapes us. Since the buyer has the right to deal in the goods of the seller's competitors, the contract cannot be based upon the condition that it will not do so. It is irrelevant whether the buyer has any present plans to exercise that right.

But in any event, the record affirmatively discloses that since the commencement of this very litigation, Peabody Coal Company, an immediate and direct competitor of respondents, offered to furnish coal for two of petitioner's oil burning units if petitioner would convert them to coal (R. 42a-54a). The obvious reason why this offer was not accepted is that petitioner's oil suppliers reduced the price of their oil so as to meet this threat of competition (R. 56a). Thus, as Judge Weick pointed out, "such possible conversion is not as remote as was claimed" (App. 22a). It is also clear that the contract, far from foreclosing the seller's competitors, engendered active competition among them for the buyer's trade.

Secondly, although conceding that "coal and oil are competitive fuels", the Court below concluded that "for the purposes of Section 3 • • • each is to be treated as a separate, defined subdivision of the fuel industry generally" (App. 9a). Accordingly, as the present contract deals only with coal, the Court held it was irrelevant that

the buyer could purchase oil for its oil burning units. It seems to us that this is a very novel, and we think, untenable method of showing that the contract at bar is based upon a condition that the buyer will not deal in the goods of the seller's competitors. The buyer is engaged in producing electricity for resale to the public at three integrated plants situated around the periphery of Tampa Bay. We submit that as it is free to burn oil (or coal) in any of these integrated units, the contract does not prevent it from dealing in the goods of the seller's competitors.[4]

Thus, the present contract is totally different from the requirements contracts held unlawful by this Court in *Standard Oil*, on which the majority below relies. There, the filling stations were required to purchase *all* their requirements of gasoline from the seller, however much their requirements might increase in the future. As this Court pointed out, "• • • the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers". *Standard Oil*, 337 U. S. at 298. Here, on the contrary, as the buyer's demands increase, the buyer is free at all times to determine whether to purchase additional coal under the contract or whether to purchase other fuels from the seller's competitors, and, of course, it can currently purchase coal (if that be the relevant "subdivision of the fuel industry") from the seller's competitors for use in its other stations.

4. In any event, as pointed out by Judge Weick (App. 24a-29a), it is plain from this Court's recent decisions, particularly *United States v. E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956) (the so-called "cellophane case"), that where, as here, we are dealing with boiler fuels, coal cannot "be treated as a separate, defined subdivision of the fuel industry generally."

Under these circumstances, we submit that the present contract more closely resembles a contract for a fixed quantity than the type of "requirements contract" held unlawful by this Court in *Standard Oil*. Indeed, we think this is apparent from a mere reading of the attempt of the majority below to meet this contention:

> "There is also an important difference between a 'requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S.D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a 'requirements' contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, 'It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, * * *'" (App. 8a).

We heartily agree with this statement, but we are in total disagreement with the Court's apparent view that it supports its thesis that the contract at bar is similar to the requirements contracts held unlawful in *Standard Oil*. On the contrary, it seems to us to prove exactly the opposite. For, as we have seen, the more the demands on petitioner increase, the freer it is to purchase coal or other fuels

from the seller's competitors. Thus this contract lacks the very element which made the requirements contracts in *Standard Oil* identical with straight exclusive dealing contracts.

The purpose and effect of the "requirements" provision in the contract at bar is not to prevent the buyer from dealing with the seller's competitors, as it was in the contracts before the Court in *Standard Oil*. Its purpose and effect is simply to provide for the fact that it is impossible to ascertain in advance the exact amount of coal which a given unit will burn, and to give the flexibility necessary to meet seasonal fluctuations in the use of electricity. Within the limits of the actual capacity of the units involved, the quantity is fixed.[5] Thus, for all practical purposes, it is identical with a contract for a fixed amount (which concededly does not come within Section 3) rather than with a full requirements contract, such as those involved in *Standard Oil*.

We submit it is incontrovertible that the present contract is not a "contract for sale • • • on the condition, agreement, or understanding that the • • • purchaser thereof shall not use or deal in the goods • • • of a competitor or competitors of the • • • seller," and therefore does not come within the language of Section 3.

II

The contract at bar does not come within the purpose and intent of Section 3.

It seems to us that the conclusion of the majority below stems in part from its refusal to consider the legislative history of the Act. Even a cursory examination of

5. The record affirmatively shows that the units of Gannon Station have a known generating capacity, which requires a quantity of fuel ascertainable in advance to within approximately 5% (R. 42a).

that history[6] incontrovertibly confirms Judge Weick's conclusion in his dissenting opinion below that it is "all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors," and that "read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to insure a continuing supply of boiler fuels at a constant price" (App. 17a, 21a).

Specifically, the practices condemned by Congress were based on the use of two types of contracts, commonly known as "tying" agreements and "exclusive dealing" agreements. A "tying" agreement is one where the seller, having control of a unique and desirable article, either through a patent or a dominant position in the market, refuses to sell or license the use of the article to a retailer or manufacturer unless the buyer agrees also to buy from the seller other articles which he may need in his trade, and which the seller can supply. In other words, the right to use other articles is "tied" to the right to use the patented or controlled article. An "exclusive dealing" agreement is one whereby a seller exerting similar economic leverage exacts the purchaser's agreement, as a condition to the right to purchase the desired article, not to deal in any similar and competing articles that might be offered by the seller's competitors.

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6. Since in its opinion in the *Standard Oil* case, upon which the Court below places its principal reliance, this Court not only discussed that legislative history a number of times (see 337 U. S. at 297, n. 4, 307, n. 10, and 312, text and n. 15), but considered it so important that the opinion was amended to correct an error which the Court had made in describing it (338 U. S. 808 (1949)), we will not burden the Court here with a lengthy discussion of that subject. For the Court's convenience we have annexed hereto as Appendix E a presentation of what we consider to be the more pertinent extracts.

In other words, Congress was concerned with attempts by powerful sellers to monopolize the market for the sale of their goods.

When the language of the Act is read in the light of the Congressional intent, we think it becomes perfectly clear that the words used are both apt and appropriate to describe the particular practices which Congress was attempting to prevent. In the first place, we submit that the natural implication of the words "It shall be unlawful • • • to • • • make a sale • • • or fix a price charged therefor, or discount from, or rebate upon, such price, *on the condition* • • • that the • • • purchaser thereof *shall not* • • •" is that it is unlawful for *a seller*[7] to *impose* the condition upon a buyer. One would not normally use that language to describe a simple contract for the supply of a single consumer's fuel requirements, which was economically necessary for and therefore desired by both parties.

Similarly, we think it is plain that the words, "where the effect of such • • • contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" must be construed as referring only to an attempt to lessen competition or create a monopoly in the "relevant market"—i.e. the market in which the seller and its competitors can normally sell their goods.[8] Otherwise, the language is mere surplusage: If the purpose of the Act were to provide that any contract such as that at bar, whereby a buyer and seller, dealing at

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7. That the Act is directed solely at sellers is indubitably shown by the fact that, as originally adopted by Congress, the Act made it a crime for a seller to impose such a condition. H. R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (May 6, 1914).

8. Obviously, petitioner is not a "market." It is but one of the many thousands of potential customers to whom respondents and their competitors could sell coal or other fuels.

arm's length and with equal bargaining power, agree, each for its own business reasons, that the seller will furnish all the buyer's requirements, shall be unlawful whenever the volume of goods covered by the contract is substantial (which is the inescapable conclusion from the decision below), the Act need merely have recited that "any contract for the sale of a substantial quantity of goods over a term of years shall be unlawful." For manifestly, every contract for the sale of goods forecloses the buyer *pro tanto* from dealing in the goods of the seller's competitors and thus ends competition and creates a monopoly for the sale of *those* goods to *that* buyer.

If the meaning of the Act were that such a contract of sale becomes unlawful whenever it can be shown that the volume of goods involved is "not insubstantial," it would follow that every substantial contract for the sale of goods would be unlawful. That was not the intent or purpose of Congress in enacting Section 3, and we submit that there is nothing in the language used by Congress requiring so strained and incongruous a construction.[9] We need not stress the catastrophic effect upon the business life of the country that would follow if such a construction were permitted to stand.

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9. The majority below concluded that simply because it "expressly refers to *'a'* contract for sale 'for *use*, consumption or resale' " (App. 5a) Section 3 of the Act was clearly applicable to a situation such as that at bar. But when these words are considered in the light of the expressed Congressional purpose, it becomes apparent that these words were necessary in order to carry out that purpose. If a single contract were not made unlawful, the Act would not have reached a single contract with a chain-store company covering a substantial segment of the market, and if the Act had not referred to contracts of sale for "use" and "consumption", the Act would not have been effective to reach tie-in contracts with small manufacturers such as those entered into by United Shoe Machinery Company with the shoemakers of the country—the particular practice which, as the legislative history shows, gave rise to the controversy resulting in

III

The contract at bar does not come within the purview of any prior decision outlawing a contract under Section 3.

In the Courts below, respondents relied upon nine cases outlawing "tying" contracts[10] and ten cases outlawing "exclusive dealing" contracts.[11] An examination of these cases will show that each one of them deals with some variation of the specific practices which Congress had regarded as objectionable when it adopted Section 3:

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the adoption of Section 3. Thus, the use of these words was both necessary and appropriate to carry out the Congressional intent. They need not, and therefore should not, be so construed as to extend the coverage of the Act to a family of contracts never contemplated by Congress.

10. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (4th Cir. 1942); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (6th Cir. 1936); *Radio Corporation of America* v. *Lord*, 28 F. 2d 257 (3rd Cir. 1928); *United States* v. *American Can Co.*, 87 F. Supp. 18 (N. D. Cal. 1949); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (N. D. Ill. 1949).

11. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809 (6th Cir. 1950); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa. 1943).

In each case the contract either contained an express "tying" condition, or prevented the buyer from buying *any* of the products involved in the contract from the seller's competitors; in each case the seller, through the ownership or control of a particularly desirable article of commerce, had sufficient economic leverage vis-a-vis the buyer to enable it to impose the exclusive dealing or tying condition[12]; in each case the Court was confronted with a practice whereby the seller imposed such conditions on a substantial number of customers, and the principal question decided by the Court was whether the effect of the contract was to substantially lessen competition or tend to create a monopoly in the market available to the seller and its competitors for the sale of their goods. Finally, in each case, the decree of the Court was directed exclusively against the seller and never against the buyer.

Respondents have not cited a single case and we believe they cannot cite any case in which the Act has been applied to a contract which did not in fact prevent the buyer from dealing with the seller's competitors, where the seller had no economic leverage vis-a-vis the buyer and where the contract represented an isolated commercial transaction having no substantial effect upon the market for the seller's goods. Thus, the Courts have never before applied the Act except in the manner intended by Congress, and never under circumstances even remotely resembling those at bar.

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12. It is true that in some cases, such as *Standard Oil*, it was argued that the buyers also desired the exclusive dealing condition. However, as Mr. Justice Frankfurter pointed out in his dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953) "* * * in the *Standard Oil* case we recognized the discrepancy in bargaining power [between buyer and seller] and pointed out that the retailers might still insist on exclusive contracts if they wanted."

IV

The decision below outlaws every substantial contract for the supply of a single consumer's requirements of raw materials.

As has been seen, we believe that the inescapable conclusion from the logic of the decision below is that any contract for the purchase of a substantial volume of goods, even though the quantity be fixed by the contract, is unlawful. It is true that the Court below sought to distinguish the contract at bar from a contract for a fixed quantity, but as we pointed out at pages 14 and 15, *supra*, we think the Court's attempted distinction proves that, on the contrary, it is indistinguishable. Certainly, as long as the decision stands, we doubt if any responsible lawyer could advise his client that a contract for the purchase of a substantial volume of goods was beyond the reach of Section 3 of the Clayton Act.

But even if the Court's attempted distinction were valid, the decision below is certainly applicable to any contract for the supply of a single consumer's "requirements," even though desired by the buyer, and regardless of whether it has any substantial effect upon the available market for the seller's goods. We think we have demonstrated above that as a matter of law such a result is neither necessary nor consistent with the language of Section 3 when read in the light of the Congressional intent. We shall now show that from an economic standpoint such a result would not only do violence to the obvious and expressed intent of Congress, but would do grave damage to the economic life of the country.

This Court has had several occasions to consider the economic effect and necessity for contracts whereby industrial consumers make provision for their fuel requirements

for a long term of years. For example, as long ago as 1931, in *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 358 (1931) this Court held that such a contract "• • • does not subject the Glass Company [the buyer] to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade." More recently, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956), in holding that the Natural Gas Act had not outlawed long-term contracts for the supply of a utility company's requirements of natural gas, this Court pointed out:

> "• • • Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor • • •."

On the basis of that decision the Court also approved a 15-year contract for the supply of a public utility's requirements of electric power. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

Similarly, the Federal Power Commission, with the approval of the United States Court of Appeals for the District of Columbia, has recently found such contracts economically necessary, and has insisted that, before a certificate of public convenience or necessity could be granted to a pipe line company to build a pipe line to supply gas to peninsular Florida, the seller should enter into binding 20-year requirements contracts with its major prospective customers. *In the Matter of Houston Texas Gas and Oil Corp. and Coastal Transmission Corp.*, 16 F.P.C. 118 (1956), *aff'd sub nom. Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643 (D.C Cir. 1957).

It is true that in these cases no question of a violation of Section 3 was raised and that each dealt with a regulated "natural monopoly." We cite them primarily as illustrative of the economic background and necessity of a contract such as that here involved, and secondly, to point out that if the decision below were allowed to stand, grave doubt would be cast as to the legality of those contracts.

The record discloses that, economically speaking, a long-term requirements contract was just as necessary to both the buyer and seller in the case at bar as it was in the cases above cited, if any business transaction between them was to take place at all. Just as it was necessary to have a requirements contract satisfactory to the Ideal Cement Company before it would erect a gas burning cement plant in Mobile, Alabama (see 350 U. S. at 336), so was it necessary for petitioner, particularly because it is a regulated public utility, to make firm and adequate provision for its future supplies of coal before it embarked upon the construction of a coal burning plant, at a cost of over $3,000,000 more than it would have cost to build an oil burning plant (R. 43a).

Similarly, the position of the sellers under the contract at bar was almost identical with that of the natural gas pipe line company in the case last cited: As noted by the Court below (App. 4a), the respondents have made an investment of over $7,500,000 in making preparation for the shipment of the coal involved in the contract from Uniontown, Kentucky, to petitioner's dock at Tampa, Florida (see R. 43a), just as the Houston Texas Gas and Oil Corp. had to build a pipe line in order to serve its

customers in eastern Florida. Such investments can not be safely made without long-term commitments.[13]

This of course is substantially true in any situation where a utility company, manufacturer or other industrial consumer is arranging for the supply of the raw materials needed in its plant. It is always good business for such a consumer to make adequate and reliable arrangements for its future requirements at a price which it believes to be advantageous, and if a substantial investment must be made by either buyer or seller to carry out the contract, a long-term contract is an economic necessity.

Thus the contract at bar is not unique or unusual. It is merely an example of the normal, simple and economically sound method by which consumers of substantial quantities of raw material in the manufacturing process customarily arrange for their supplies. We have no doubt that there are thousands of such contracts in this country. Congress never intended to outlaw such arrangements, for they involve none of the evils which Congress was attempting to prevent when the Act was under consideration. Moreover, we submit that Congress could not reasonably be expected to have so intended. For it is self-evident that the economic consequences on the business life of this country resulting from outlawing all such arrangements would be incalculable.

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13. It should also be noted that one of the controlling factors which led the Federal Power Commission to insist upon 20-year requirements contracts was that gas was a newcomer attempting to break into the existing oil monopoly in peninsular Florida (16 F.P.C. at 122-23). The identical factor is, of course, equally present in the case at bar. Thus the contract at bar is also defensible on the ground that the qualifying clause was not meant to apply to such a situation. As was pointed out by Senator Walsh in explaining the qualifying clause to the Senate:

> "* * * it was found no easy task to frame a statute which would reach the case of a plundering monopolist which would not only not hamper many legitimate transactions but not be oppressive to a struggling industry contending for trade against a competitor enjoying a practical monopoly or one long established and supported by unlimited capital." 51 Cong. Rec. 16145 (1914).

V

In any event, the contract at bar does not "substantially lessen competition or tend to create a monopoly" within the meaning of the Act.

Even if the contract at bar did come within the meaning of the Act, we submit that it does not meet the substantiality test contained in the qualifying clause. Despite this Court's recent holding that "substantiality can be determined only in terms of the market affected,"[14] the Court below made no attempt to define a market. It merely held the contract unlawful because the estimated "total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial" (App. 11a). We submit that Judge Weick was correct when he dissented on the ground that:

> "I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as 'substantially lessening competition or tending to create a monopoly.'" (App. 31a, see R. 3b)[15]

In terms of the relevant market—whether as the Court below would have it, the market for the sale of *coal* as boiler fuel available to the respondents and their competitors (the 700 coal producers in the Ohio Valley), or, as we see it, the market for boiler fuel of any kind—the amount of coal covered by this contract is a drop in the

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14. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593 (1957).

15. The fact that the amount of coal sold under the contract would soon exceed all of the coal previously sold to the entire State of Florida (App. 11a) is immaterial, since it is conceded that at the time the contract was entered into oil had virtually a complete monopoly in the Florida fuel market (App. 4a).

bucket. For that market embraces all the consumers of fuel not only in Florida but in at least the Eastern half of the United States.

Moreover, as we have seen, the immediate effect of this contract was to stimulate respondents' coal competitors to offer coal to petitioner at competitive prices for use in petitioner's oil burning units, and thus force respondents' oil competitors to reduce their prices. We suggest that it is ludicrous to say that such a contract lessens competition or tends to create a monopoly.

To show that this contract substantially lessens competition or tends to create a monopoly within the meaning of the Act it would be necessary for respondents to show that they had tied up a substantial segment of the market for boiler fuel available both to them and to their competitors. An isolated contract of sale whereby a single consumer arranges for the supply of its fuel requirements from a single supplier cannot have any such result, and therefore cannot come within the purview of the Act.

VI

The conclusion of the Court below that a seller can escape its contractual obligations by pleading its own unlawful act under Section 3 is erroneous, unprecedented, and in conflict with a recent decision of the Seventh Circuit.

The majority of the Court below held that a seller can repudiate a contract of sale which the purchaser wishes to enforce on the ground that it, the seller, unlawfully entered into the contract in violation of Section 3 of the Clayton Act. Here again the Court rewrote Section 3 to produce a result never intended by Congress, and never reached by any other court in the 45 years since the passage of the Act.

As we have seen, the sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class, from coercive action by powerful sellers. The Act by its very terms is directed only at the seller. It does not declare that any contract which contains an exclusive dealing condition shall be unlawful. It says merely that it shall be unlawful for any person to make a sale or contract of sale (*not* a purchase or contract of purchase) upon such a condition. Thus it is quite different from such statutes as the Sherman Act which declare that certain contracts are unlawful in themselves. 15 U. S. C. §1. It follows that under Section 3 it is only the act of the seller in entering into a contract of sale on the prohibited condition that is unlawful. As this Court held in the *Bruce's Juices* case,[16] remedies not authorized by a statute such as Section 3 should not be judicially added to the anti-trust laws.

Moreover, the holding of the Court below conflicts with an almost contemporaneous decision of the United States Court of Appeals for the Seventh Circuit, entered on December 15, 1959, in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). That case, like the instant case, was an action by purchasers for a declaratory judgment that a contract (a dealership franchise agreement) which defendant had with each of the purchasers was legal and enforceable. The agreements required the buyers to purchase all their requirements of various water softening products exclusively from defendant, and in a prior proceeding instituted by the Federal Trade Commission, a consent decree had been entered specifically prohibiting the *seller* from enforcing them, on the ground that they violated Section 3 of the Clayton Act. Thereafter the defendant seller notified the buyers that, as the contracts were unlawful, they would not be carried out.

16. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743 (1947).

The Court held that the contracts could be enforced by the purchasers, basing its decision on the alternative grounds that (1) the "requirements" provision could be excised from the contracts in accordance with a severability clause which they contained, and (2) the defendant could not "use this illegal provision as an excuse for avoiding its own contractual obligations" (274 F. 2d at 35). On this second point, the Court stated:

> "In enacting the Clayton Act, Congress had in mind the protection of dealers. The House Report stated the legislation was designed to prevent an unfair trade practice which was '* * * *unfair to the local dealer* and to the community * * *.' (Emphasis supplied.)
>
> "Courts are reluctant to invoke the doctrine of *in pari delicto* where to do so would manifestly work an injustice. Allgair v. Glenmore Distilleries Co., D. C. S. D. N. Y., 91 F. Supp. 93.
>
> "Corbin, in his treatise on contracts (6 Corbin, Contracts, §1540 (1951)) states:
>
> "'If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrong doer. * * * The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.
>
> "'In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal. In such cases, in order to attain the purposes of the law, the courts have frequently enforced the bargain by one or more of the usual remedies, in favor of a party for whose benefit the law was intended and

against a party toward whom the prohibition or penalty was directed. • • • There is no reason why, in a case otherwise proper, a decree for specific performance should not be granted.'

"We hold the case at bar is not one in which the defense of *in pari delicto* may be used to deny relief to the plaintiffs." (274 F. 2d at 35).

We respectfully submit that this Court should resolve the conflict between the instant case and the *Culligan* decision, and should pass upon an important antitrust question which it has never before considered, namely, whether a *seller* can escape its contractual obligations by contending that a contract which the purchaser desires to enforce violates Section 3 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 12, 1960

APPENDIX A

No. 13,775

United States Court of Appeals

FOR THE SIXTH CIRCUIT

TAMPA ELECTRIC COMPANY,
Appellant,

v.

NASHVILLE COAL COMPANY,
NASHVILLE COAL, INC., and
WEST KENTUCKY COAL COMPANY,
Appellees.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided April 4, 1960.

Before: MILLER, CECIL and WEICK,* Circuit Judges.

MILLER, Circuit Judge. The appellant, Tampa Electric Company, brought this declaratory judgment action in the District Court, pursuant to Sec. 2201, Title 28, United States Code, for the purpose of having its contract of May 23, 1955, providing for the purchase of coal by it from the appellees, declared valid and enforceable. The appellees contended that the contract was illegal and unenforceable by or against either of the contracting parties, in that it was contrary to Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, *Sections 1, 2 and 14, Title 15, United States Code*. The facts not being in dispute, both the appellant and the appellees moved for summary judgment. The District Judge held that the contract was in

* On the day of the oral argument of the case in this Court, Judge Weick was a District Judge sitting by designation. He was sworn in as Circuit Judge on the following day.

violation of Section 3 of the Clayton Act, was therefore illegal and unenforceable, and that the appellant was entitled to no relief against any of the appellees on account of their refusal to perform under the contract. *Tampa Electric Co.* v. *Nashville Coal Co.*, 168 F. Supp. 456, M. D. Tenn. This appeal followed.

Appellant is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees are engaged in mining and selling coal.

In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

The May 23, 1955, contract was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract.

The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Ken-

tucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

> "Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed."

It also provided,

> "The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer."

The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The

third unit, a coal burning unit, was under construction at the time this action was filed.

For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

"To increase as required to about 2,250,000 tons per year."

At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year.

Appendix A

Section 3 of the Clayton Act provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * contract for sale of goods, * * *, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * *, on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods, * * *, supplies, or other commodities of a competitor or competitors of the * * * seller, where the effect of such * * * contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant's initial contention is that the statutory history of Section 3 shows that the Act was not intended to apply to consumers; that it was intended solely for the purpose of protecting dealers and retailers from certain specific practices whereby powerful sellers, through some form of economic leverage, frequently required them to execute agreements not to deal in a competitor's goods as a condition to the purchase of the seller's goods; and that Congress never contemplated that the Act should prevent a consumer from contracting for the purchase of his requirements of a single commodity, even though the amount was very substantial. In other words, Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process. The statutory language is not so restrictive. It expressly refers to *"a"* contract for sale "for *use,* consumption or resale." (Emphasis added.) The wording clearly includes a single sales contract for *use or consumption,* as well as multiple sales by sellers to numerous dealers or retailers for resale. There is nothing ambig-

uous about this language of the statute. Under such circumstances, we do not look to the legislative history of the Act in order to give it a different construction. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court had under consideration the construction of Section 3 of the Clayton Act. The Court said, "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." To the same effect is *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. (2) 867, 870, C. A. 7th; *George Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253-254. See also: *Ohio Power Co.* v. *N. L. R. B.*, 176 F. (2) 385, 387, C. A. 6th, cert. denied, 338 U. S. 899; *Mid-Continental Petroleum Corp.* v. *N. L. R. B.*, 204 F. (2) 613, 623, C. A. 6th, cert. denied, 346 U. S. 856.

The statute condemns certain transactions, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce. A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result. If it does have this result and is otherwise included within the plain wording of the statute, the statute must be construed in accordance with the Congressional purpose. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351; *Cornett-Lewis Coal Co.* v. *Commissioner*, 141 F. (2) 1000, 1004, C. A. 6th. In *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 302-305, the Supreme Court held Section 3 of the Act applicable to a situation where the seller did not occupy a dominant economic position in the industry.

Appendix A

Appellant contends that the contract of sale was not entered into "on the condition, agreement, or understanding" that the appellant would not use or deal in the goods of a competitor, which is necessary in order for the statute to be applicable. Concededly, the contract is a "requirements" contract and does not expressly contain the "condition" required by the statute. But, the contract provides for the appellees to supply the appellant its "total requirements" for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units. The actual result of this contract is to prevent the purchaser from buying any coal for those units from a competitor of the appellees. We agree with the ruling of the District Judge that the contract is one within the sense and meaning of Section 3 of the Clayton Act, in that it requires the buyer not to use or deal in the goods of a competitor of the seller, irrespective of the absence of the specific words contained in the statute. In *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, and *Anchor Serum Co.* v. *Federal Trade Commission, supra*, 217 F. (2) 867, C. A. 7th, the contracts therein declared illegal were "requirements" contracts, which did not contain the unlawful condition in *haec verba*.

The foregoing ruling does not mean that "requirements" contracts are illegal *per se*. As pointed out in *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, 306-307, "'requirements' contracts may well be of economic advantage to buyers as well as to sellers. The effect of the particular contract under the circumstances of the case is the determining factor. A "requirements" contract of some companies over a short period of time might well avoid the effect proscribed by

the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute. *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982, N. D. Ill.; *United States* v. *American Can Co.*, 87 F. Supp. 18, 31-32, N. D. Cal.

There is also an important difference between a "requirements" contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a "requirements" contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States, supra,* 337 U. S. 293, 314, "It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, • • •."

Appellant makes the further contention that Section 3 is not applicable because the contract does not prohibit it from dealing in the goods of a competitor, as required by the Act. It is argued that coal and oil are competitive fuels, that the contract deals only with the purchase of coal, and that the appellant, as is permitted by the contract, buys oil from various suppliers for its non-coal

burning units. It is also pointed out that there is the possibility that existing oil burning units could be converted to coal or that additional coal burning units, not covered by the contract, could be constructed, the coal for which could be purchased from any of appellees' competitors. The argument is a plausible one, but we believe it completely ignores the realities of the situation.

It is true that coal and oil are competitive fuels. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72. But, for the purposes of Section 3 of the Clayton Act, we believe that each is to be treated as a separate, defined subdivision of the fuel industry generally. *George Van Camp & Sons* v. *American Can Co.*, *supra*, 278 U. S. 245, 253; *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 593-594; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. (2) 764, 766, C. A. 6th. The present contract deals with coal and coal burning units only, and we treat as irrelevant appellant's purchases of oil for its oil burning units in an entirely separate plant at a different location.

At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate that there is any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract. The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller. We agree with the ruling of the District Judge that the question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before the Court. *Interna-*

tional Salt Co. v. *United States*, 6 F. R. D. 302, 307, S. D. N. Y., 332 U. S. 392; *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 10, footnote 8; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. (2) 952, C. A. 1st, cert. denied, 326 U. S, 776; *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. (2) 48, C. A. 4th.

As appellant contends, it is not sufficient that the "requirements" contract is one which in substance prohibits the purchaser from dealing in the goods of a competitor of the seller. Under Section 3 such a contract is not invalid unless its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In *International Salt Co.* v. *United States, supra*, 332 U. S. 392, 396, the Court ruled that where the volume of business affected by the contract cannot be said to be insignificant or insubstantial the tendency of the arrangement to accomplishment of monopoly seems obvious, pointing out that it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. In *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, 314, the Court held that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected and that it was the purpose of Section 3 to remove a potential clog on competition wherever, were it to become actual, it would impede a substantial amount of competitive activity. Applying this standard to the present case there is no question but that the effect of the contract will be to substantially lessen competition. At the estimated 1959 rate of consumption, namely 700,000 tons per year, it would about equal peninsular Florida's annual coal consumption prior to the execution of the contract.

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Using the estimated 1,000,000 tons for 1961 as the average annual purchases during the twenty year life of the contract, the total dollar pre-emption over the life of the contract at the minimum price of $6.50 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial.

Nor is the case removed from the operation of the Act by the fact that the contract would have overall beneficial results in starting the substantial use of coal in peninsular Florida and thus afford substantial competition to the use of oil. The possible benefits that may result from one particular contract, by reason of the special circumstances applicable to it, cannot override the general policy of the Act prohibiting transactions which tend to create a monopoly in any line of commerce. *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2) 552, 559, C. A. 4th, cert. denied, 340 U. S. 906; *Standard Oil Co. of California* v. *United States*, *supra*, 337 U. S. 293, 311-312.

Although the contract is in violation of the statute and therefore illegal, appellant contends that the appellees should not be allowed to take advantage of their own illegal act to relieve themselves of a contract obligation which now appears burdensome. Appellant recognizes the well settled general rule that a court will not lend its assistance in any way towards carrying out the terms of an illegal contract. *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 F. 543, 550, C. A. 6th; *National Transformer Corp.* v. *France Mfg. Co.*, 215 F. (2) 343, 361, C. A. 6th. But, it urges upon us a well recognized exception to this general rule that if the parties are not in *pari delicto* and the undertakings of each are not equally blameworthy, a court of

equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent. *Marshall* v. *Lovell*, 19 F. (2) 751, 753-754, C. A. 8th, quoting from *Pomeroy's Equity Jurisprudence*, *4 Ed. Section 942; Restatement, Contracts, Section 601; 6 Corbin, Contracts, Section 1540 (1951); Ring* v. *Spina*, 148 F. (2) 647, 653; C. A. 2nd; *Allgair* v. *Glenmore Distilleries Co.*, 91 F. Supp. 93, 95-96, S. D. N. Y.; *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, 42 F. Supp. 711, 717, W. D. Pa. Appellant points out that Section 3 of the Clayton Act is directed against the seller; its purpose is to protect the buyer; and that the case falls within the exception.

We think that our decision on this issue is controlled by the recent analysis of the problem by the Supreme Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In that case the Court rejected the defense of illegality in an action under a contract which violated the Sherman Anti-Trust Act, but pointed out that in a restricted class of cases the defense was a valid one. If the contract is of such a nature that a part of it constitutes an intelligible economic transaction in itself and the enforcement of that portion of the contract would not be to enforce a violation of the Act, then such portion of the contract will be enforced in order to avoid an inequitable result. But, the Court will not enforce a contract which is illegal under the anti-trust laws of the United States if, in doing so, the Court would be a party to carrying out of one of the very restraints forbidden by the Act. *Kelly* v. *Kosuga*, *supra*, at page 520; *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, 212 U. S. 227, 261-263. It is immaterial whether the contract was for the benefit of the seller or the buyer. The determining factor is whether the result of the contract had the proscribed effect and this is so, even though

the result is a harsh one for one of the parties. *Anchor Serum Co.* v. *Federal Trade Commission*, *supra*, 217 F. (2) 867, 870, 873, C. A. 7th. The aid of the Court is denied not for the benefit of either of the parties, but because public policy demands that it should be denied without regard to the interests of individual parties. *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, *supra*, 212 U. S. 227, 262.

The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid. The recent decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. (2) 29, December 15, 1959, rehearing denied January 12, 1960, is, we believe, distinguishable for the same reasons. Under such circumstances, the Court will not assist either party in its enforcement.

This view of the case makes it unnecessary to consider the effect of Sections 1 and 2 of the Sherman Act.

The judgment is affirmed.

WEICK, Circuit Judge, dissenting. It is with reluctance that I have filed this dissenting opinion, particularly in view of the careful consideration which this case has received by the majority and by the District Judge. With deference to my colleagues, whose views I respect, I am of the opinion that the authorities on which they relied,

when applied to the facts of this case, do not compel the decision which they reached. I think the judgment below has produced a harsh result, not in the contemplation of the Clayton Act, which is being enforced against the wrong party.

The seller[1] has successfully avoided its contractual obligations with the defense that in making the contract of sale it violated the anti-trust laws, § 3 of the Clayton Act (Title 15 U. S. C. § 14). While this defense has been frequently resorted to by buyers in attempting to avoid payment of their indebtedness to sellers, it is, I submit, somewhat unusual for a seller to plead its own violation of the anti-trust laws in asking a court to relieve it of its contractual obligations, particularly since these laws were aimed at sellers and not buyers.

The type of defense availed of here by the seller has not met with favor by the Supreme Court when invoked by a buyer. *Kelly* v. *Kosuga*, 358 U. S. 516, 518 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); 42 *University of Virginia Law Review* 785.

In enacting the anti-trust laws Congress created a right and prescribed the remedy. The remedy of private parties injured by reason of violation of the anti-trust laws is an action for treble damages[2] and injunction.[3] There are also enforcement provisions for injunctive relief in actions by the Federal Trade Commission[4] and the United States.[5]

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[1] For the purposes of this opinion appellant will be referred to as Tampa or buyer and appellee as seller.

[2] Title 15 U. S. C. § 15.

[3] Title 15 U. S. C. § 26.

[4] Title 15 U. S. C. § 21.

[5] Title 15 U. S. C. § 25.

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The remedy provided private parties would seem to be adequate, namely, the recovery of treble damages and an injunction to stop the illegal practices. In any event, the statutory remedy is all that Congress provided. Congress could have vitiated contracts made in violation of the Clayton Act. It did not do so.

The provisions of the Clayton Act are materially different from Section 1 of the Sherman Act. The Sherman Act is directed to "every contract • • • in restraint of trade or commerce • • • is declared to be illegal." 15 U. S. C. 1. The Clayton Act is directed against the person. It provides: "• • • It shall be unlawful for any person • • • to contract for sale of goods • • •." Criminal sanctions are imposed for violation of the Sherman Act, but not for violation of the Clayton Act.[6]

Appellee successfully argued in the District Court that the legislative history of the Clayton Act should be ignored, on the authority of *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

While it may have been crystal clear in *Standard Fashion* that the contract there involved was a violation of the Clayton Act, I feel that it is not so apparent when applied to the contract here. The legislative history is important because it aids in the interpretation of the statute and reveals that Congress never intended the law to be applied to such a case as the one at bar.

In *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), the Court said:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding

[6] The bill as it passed the House of Representatives contained criminal sanctions. These were eliminated in the Senate.

> resort to explanatory legislative history no matter how "clear the words may appear on superficial examination."

Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918), said:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which it is used.

It has been well stated:

> The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence * * *. Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning * * *. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time. Landis, *A Note on Statutory Interpretation*. 43 *Harvard L. Review* 886, 888, 889, 892.

The evils sought to be remedied by the Clayton Act were set out in the reports of the Congressional committees, in the hearings before the committees and in the debates.[7]

The evils were declared to be exclusive or tying contracts made between manufacturer and dealer whereby the latter specifically agreed not to deal in the commodities of the seller's competitors and contracts tying non-patented articles to the sale of patented articles.

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[7] H. R. Rep. No. 627, 63rd Cong. 2nd Session (May 6, 1914); S. Report No. 698, 63rd Cong. 2nd Session (July 22, 1914); 51 Cong. Rec. 9406, 9407, 9160, 14226, 14270.

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The legislative proceedings are all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors. The legislation was directed against sellers, not buyers, and was intended to curtail the monopolistic practices of the commercial and industrial giants of the day.

At the same time, the need was recognized for more effective legal relief to private parties injured by violation of the anti-trust laws. Private parties threatened by loss or damage from violation of the law were given the right to injunctive relief, and treble damage actions were facilitated by making judgment in a Government suit or prosecution prima facie evidence of the violation there established. Despite these efforts to aid private parties, no action was taken to incorporate the provisions of pending bills which would have authorized broad application of the defense that the plaintiff in a civil action had violated the anti-trust laws. Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. R. 507, 551.

Annexation of the illegality defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. Cf. *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 752 (1947).

The buyer was a privately owned public utility engaged in the production and sale of electricity. It served the City of Tampa and surrounding communities. It operated under franchise from the State of Florida and was regulated by public authority. Its rates were fixed by the

Public Utility Commission of Florida. It was a monopoly operating under legal sanction.

While this did not give Tampa license to violate the anti-trust laws, *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950), cert. denied 340 U. S. 906 (1950), nevertheless, its needs and requirements as a regulated public utility, which were materially different from those of private industry, are factors that must be considered in determining the propriety of the contract in the present case. As was stated by the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Company* v. *Federal Trade Commission*, 193 F. 2d 230, 234 (C. A. D. C., 1951), aff'd 343 U. S. 414 (1952), "the anti-trust laws can have only limited application to industries regulated by specific statutes." The Court observed that laws aimed at combatting monopolistic practices must be applied somewhat differently to those industries which are of themselves monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business.

The buyer was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted.

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It is fairly inferable from the record that a rise in the market price of coal took place subsequent to the date of the contract and prior to the time for commencement of deliveries thereunder because, after the seller's repudiation, the buyer had to pay a substantially higher price than the contract price for its requirements of coal. The contract, however, contained an "escalator clause" to take effect upon the commencement of the contract in 1957 providing for adjustments based on the average weekly gross earnings of production workers in manufacturing industry.

The fact that the buyer was required to pay a substantially higher price for coal after the seller's repudiation demonstrates the wisdom of having an enforceable contract. Having such a contract would not only fix the price of coal, but also ensure the continuity of supply. In order to take care of the requirements of its customers, which undoubtedly involved seasonal low and peak loads, a requirements contract seemed best adapted for Tampa's needs. The contract contained a provision for adjustment of any gross inequity that could result from the economic conditions not contemplated by the parties, which was to be corrected by agreement or arbitration.

In the case of *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353 (1931), the contract in suit called for the largest consumer of gas in Fort Smith, Arkansas to take all its requirements from one company, which amounted to a million to a million and a half cubic feet per day. The pipe line company sued for specific performance of the contract. The contract in question had no time limit, but the consumer did have the option to purchase other gas if the gas company could not deliver an adequate supply. Although the defense interposed was

that the contract was contrary to the public policy and laws of Arkansas, the considerations involved were that the contract was illegal because "it [was] in restraint of trade, tends to the monopolization at Ft. Smith of the sale of gas by the pipe line company, and is an undue restraint of business competition between companies supplying gas". 39 F. 2d 408, 409. The Court of Appeals held the contract to be illegal. 39 F. 2d (C. A. 8). The Supreme Court reversed, and entered judgment for the plaintiff. In so doing the Court stated:

> • • • The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.
>
> The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. 283 U. S. 333, 358.

In the case of *In the Matter of Houston Texas Gas & Oil Corp.*, 16 F. P. C. 118 (1956), the Federal Power Commission approved a 20 year requirements contract under which gas would be brought into Florida to compete with oil. Its approval was conditioned on elimination of cancellation provisions. The Court of Appeals affirmed in *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643 (C. A. D. C., 1957), cert. denied 356 U. S. 959 (1958), stating: "• • • The injury to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly," id., 649. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

The long term of this contract (20 years) and the fact that over the years it involved a large amou of coal were

factors taken into account by the majority in holding it illegal. The business of the buyer required it to use large quantities of boiler fuel. Yet as compared with oil, only two units were using coal whereas eleven units were burning oil.

Prior to the seller's repudiation of the contract, Tampa, in reliance on the contract, had made a capital expenditure of $3,000,000 more than would have been required for oil burning equipment. The seller had also expended $7,500,000 in order to place itself in position to perform the contract. It is, of course, unfortunate for both parties that the seller did not discover that it had violated the law until after these large capital expenditures had been made. Assuming that each entered into the contract with the profit motive in mind, I do not think that 20 years was an unreasonable length of time in which to amortize, out of profits, these large capital expenditures.

It is my firm conviction that, read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price. Such a contract is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility. The holding in the *Twin City* case, *supra*, and the insistence upon such a contract by an agency of the United States in the *Houston Texas Gas & Oil* proceedings, *supra*, only serves to substantiate that opinion.

Even if the view is taken that the Clayton Act is applicable to the contract in suit, I feel that no violation thereof has been established.

In order for the contract of sale to violate the Clayton Act two elements must be proven. First, that the contract

was "*on the condition, agreement or understanding* that the • • • purchaser • • • shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor • • • of • • • seller." Second, the effect must be to substantially lessen competition or create a monopoly in any line of commerce[8] (Emphasis added.)

No such condition was embodied in the written contract either expressly or by fair implication. All that the contract provided was for the supply of the buyer's total requirements *for the first two coal burning units to* be installed at the Gannon Station and for any others built there *during the first ten years* of the contract. Eleven existing units were burning oil. The buyer was free to convert all of its oil burning units to coal burning units and purchase its coal therefor from anyone it chose. Such possible conversion is not as remote as was claimed. In an affidavit of Tampa's president, it is stated that conversion of other units is presently being considered. The buyer was also free to erect new coal burning units at any place other than at Gannon Station, and after ten years at the Gannon Station, and buy its coal from anyone. The buyer also had the option at the Gannon Station to reduce the quantity of coal by 15% if it desired to use the by-product of a local supplier.

Since the contract contained no such condition, agreement or understanding as the Clayton Act proscribes, the Act had no application to the present case. But the seller claims that any "requirements" contract comes within the purview of the Clayton Act. I do not agree. A requirements contract could not come within the scope of the Act unless in effect it prohibited the buyer from dealing in the

[8] Title 15 U. S. C. § 14.

goods of any one else and operated substantially to lessen competition or create a monopoly. If the contract was to purchase only part of the buyer's requirements and he is free to purchase the remainder elsewhere, no violation of the statute occurs.

Looking at the actualities of the case, the buyer was not a dealer in coal or oil. It consumed both in making electricity which it sold to the public. In the very real sense, coal and oil were competitive fuels and the buyer was using both. Eleven of its units were oil burning and only two were to be coal burning. Prior to the construction of the coal burning units at its Gannon Station the buyer used only oil. In fact, on account of the contract in question coal for the first time broke into the Florida utility market which theretofore had been heavily blanketed by large oil companies.

The fact that the contract provided for the buyer's requirements at the two units of the Gannon Station did not bring the contract within the scope of the Clayton Act because it did not foreclose the buyer from using coal in other plants or dealing with the seller's competitors elsewhere.

It must be remembered that at the time of the contract the Gannon Station had not been erected. The contract provided for something to be done in the future. It did not limit Tampa in converting or constructing other coal units anywhere or purchasing coal from anyone except for use at the Gannon Station. The buyer had no interest in creating a monopoly of coal in the seller.

But even if the contract could be construed as requiring the buyer to take all its requirements of coal from seller, under the facts and circumstances of this case, there was no violation of the law.

Of importance in this regard is the holding that, in the circumstances of this case, coal constitutes a "line of commerce." The coal was purchased by Tampa as a source of power for its generators, not for resale to ultimate consumers. It was to be used as a boiler fuel.

The record shows that the Atomic Energy Commission has approved the application of Tampa to build an atomic reactor. It is planned that electricity generated from fissionable fuel will be on its lines by 1964. In order to induce Tampa not to convert its other boilers from oil to coal the oil companies have offered to reduce the price of oil.

It is my conviction that the line of commerce in which these parties were dealing was boiler fuels, not just coal. If the line of commerce is boiler fuel generally, then this contract could not come within the purview of Section 3 of the Clayton Act, as Tampa was certainly free to purchase boiler fuels, other than coal, from whoever it chose.

The standard to be applied in determining what constitutes a line of commerce is derived from three recent Supreme Court decisions, *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957), and *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956).

In the *International Boxing Club* case the question presented was whether championship boxing contests were distinct from all professional boxing events. The Supreme Court held they were.

In the 1957 *duPont* case the question presented was whether automotive fabrics and finishes were distinct from all other fabrics and finishes. The Supreme Court held they were.

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In the 1956 *duPont* case the question presented was whether cellophane was distinct from all other flexible packaging materials. The Supreme Court held it was not. In each of those cases the test applied was constant, while the results differed. The test was enunciated in the *duPont* cellophane decision (351 U. S. 377):

> Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. (at p. 393)
>
> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580.
>
> The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal. (at pp. 394-5)
>
> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. (at p. 400)
>
> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. (at p. 404)

With the basic criteria in mind, the three decisions are easily reconciled. As was developed in extensive findings of fact in the *du Pont* cellophane case, a variety of prod-

ucts are wrapped in both cellophane and several other flexible packaging materials. More simply, a loaf of bread can be wrapped with equal facility in cellophane, wax paper, etc. They are interchangeable. On the other hand, a car cannot be painted with house paint and vice versa. Hence, the result in the 1957 *du Pont* litigation. As to the *International Boxing Club* decision, the Court found that, in public appeal, championship fights exert a different drawing power than do other boxing matches. The decaying status of professional boxing in the United States attests to that fact, as it is only the occasional "glamour" fight which is able to create even a ripple of public enthusiasm.

It is interesting to note though, that in each of the decisions the line of commerce was of such scope as to include sub-divisions within it. The general classification of championship fights covers bouts in each weight class; automotive finishes and fabrics have many variations; the diversity of flexible packaging materials considered is clearly seen in the Court's opinion in the *du Pont* cellophane case.

An excellent analysis of the proper application of the "line of commerce" test is found in *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (D. C. S. D. N. Y., 1957) probable jurs. noted 355 U. S. 937, 951, judgments vacated for consideration of United States' motion to dismiss 358 U. S. 915 (1958). In that action it was alleged that certain French manufacturers and American distributors of perfumes had registered the trade-marks of various perfumes in the name of the American distributors in order to monopolize the American market for those brands. The Court heard evidence that many perfume manufacturers were able to virtually duplicate the fragrances of their

competitors and that the average person would not distinguish between the two scents. On the other hand, it was shown that in fact the most important element in successful marketing of name brand perfumes is the establishment of a demand for the name, rather than the odor. The Court concluded:

> Objectively, the products may be more than reasonably interchangeable with others. But the lack of objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity.

The Court distinguished that situation, wherein consumer demand is for a name, with the motives of the manufacturers in the *du Pont* cellophane case, who:

> Were guided by careful and objective considerations of utility and price * * *. Thus, small variations in price or quality would induce a manufacturer to shift from one flexible packaging material to another, in accordance with a balance of all the utilities toward the achievement of the most efficient economic operation.

A converse holding, based on the interchangeability test, is found in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y., 1957) aff'd 259 F. 2d 524 (C. A. 2, 1958). There the court held refined sugar generally to be a line of commerce, whereas it had been contended that cane sugar and beet sugar were separate lines. This finding was upheld in the Court of Appeals, which noted that the two types of sugar are functionally interchangeable, notwithstanding the fac that cane sugar sells at a higher price than beet sugar, and that cane sugar has a greater public acceptance.

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A factor emphasized by the Court of Appeals was the sensitivity of the two types of sugar to price changes by one another.

Where does coal, as a boiler fuel, fit into this pattern? The Supreme Court has taken judicial notice of the competitive nature of fuels generally. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935). This should be some indication that boiler fuels as a class are a line of commerce.

Application of the interchangeability test convinces me that there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coal, oil, gas and atomic energy—is utilized in the same manner to produce the same result. As each is consumed power is produced to drive the generators which in turn produce electric energy. The public demand being satisfied is for electric energy and the boiler fuel being utilized in the production thereof is not a material factor influencing the consumers' market.

What is presented here is the instance of a producer guided by careful and objective considerations of utility and price striving to achieve the most efficient economic operation, as in the *du Pont* case, rather than an instance of a non-objective consumer market, as in the *Guerlain* case. It is clear from this record that Tampa is basically concerned with factors of economic utility in its operation, as it is considering conversion of other oil burning units and expansion into the field of atomic energy as a source of power. Such decisions are motivated by a desire to render the best possible service at the lowest practical rates, while realizing a reasonable profit.

The factor of price sensitivity is also present in this case. Following the initial use of coal by Tampa its oil

suppliers offered to reduce prices in order to meet the challenge of the new fuel.

I find that coal, oil, gas and atomic energy meet the interchangeability test and are components of the general line of boiler fuels. This contract, relating only to coal, cannot establish a monopoly in a "line of commerce" within the meaning of the Clayton Act, and accordingly cannot be violative thereof.

Even if coal is deemed to be the relevant line of commerce that alone does not establish a violation of the Clayton Act by this contract. In order that a requirements contract come within the terms of the Act its effect must be "to substantially lessen competition or tend to create a monopoly in any line of commerce." Requirements contracts are not *per se illegal*. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 524 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 728-9 (1944). Cf. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Beloit Culligan Soft Water Co.* v. *Culligan, Inc.*, —— F. 2d —— (C. A. 7, 1959). This fact was tacitly admitted in the *Standard Oil* decision, when it was recognized that:

> Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers and thus indirectly of advantage to the consuming public. 337 U. S. 293, 306.

See dissenting opinion of Justice Frankfurter in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953).

What were the actual monopolistic consequences of this single contract? At the time it was entered into, in the entire State of Florida only 792,000 tons of coal were

being consumed annually. It was conceded that within a short period of time the Gannon Station would be using amounts in excess of that to satisfy its requirements.

Looking only at those two figures the contract would appear, in fact, to have created a situation of monopoly in favor of the seller in Florida. However, it was also conceded that as a result of this contract Tampa became the only substantial consumer of coal in Florida. Further, at the time the contract was entered into coal accounted for less than 6% of the fuel consumed in the entire State of Florida, and every power-generating unit in Peninsular Florida burned oil in its boilers.

Tampa services an area of approximately 1,700 square miles covering only 3% of the total land area of Florida. Within that area resides approximately 11% of Florida's population.

Any monopoly which seller enjoys extends only to that area serviced by Tampa. Competition has not been foreclosed by this contract for the coal business of the utilities serving the remaining 97% of the state embracing the 89% of the population residing therein. I do not consider this evidence to fall within the area of economic inquiry rejected as irrelevant by the Supreme Court in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949). In that case it was urged that in fact competition had flourished as a result of the contracts under attack. The Court said that in light of the fact that Standard Oil had 8,000 exclusive dealing contracts with 16% of the retail outlets selling 6.7% of all gasoline in a seven state area such evidence could not overcome the natural tendency of the contracts to substantially lessen competition and should not be considered. That situation is so far removed from the one at bar that I cannot consider the

holding to militate against consideration of the market left free for competition after this contract.

It may be contended that this circumstance is too speculative and founded upon a mere possibility that other utilities may convert to the use of coal. In answer to that it need only be observed that prior to this contract Tampa was not a coal consumer, but that it made the change. It is not unreasonable that now, once coal in any significant quantity has been introduced into the Florida market, other utilities may follow suit. They are a presently existing potential market. The choice of conversion is up to them, as it was to Tampa, prodded perhaps by sales promotion on the part of coal companies wishing to acquire their business.

I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as "substantially lessening competition or tending to create a monopoly." The remainder of the utilities throughout the state are a potential market for free competition. If they choose not to deal in the commodity covered by the contract, for reasons of their own, that should not operate to invalidate the one contract already entered into.

Any contract of sale, to some degree, lessens competition, as it takes the particular buyer out of the competitive market for the commodity contracted for. But the Clayton Act requires more than that—the lessening must be substantial, and substantiality is lacking where 89% of the potential consumers of a product in a state are free to deal among all who sell it. Cf. *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (C. A. 7, 1934), cert. denied 294 U. S. 706 (1935).

Appellee has not cited any authority in which a single contract of such limited application as that under con-

sideration has been held to violate the anti-trust laws. Indeed, in the prior decisions either or both of two elements, each of which is absent herein, existed.

This contract in no way resembles the so-called "tying agreements" where the owner of a patented product attempts to extend his patent monopoly by requiring the buyer to purchase non-patented articles also, *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (C. A. 6, 1936); *Radio Corp. of America* v. *Lord*, 28 F. 2d 257 (C. A. 3, 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (D. C. N. D., Ill., 1949); or where the seller had such market domination over a non-patented article as to be able to require the purchase of a "tied" product with it. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C. A. 1, 1945), cert. denied 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (C. A. 4, 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (D. C. S. D. Cal., 1949).

Those cases not involving tying agreements had the other principal element not found here—an actual monopoly in the relevant market. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the seller controlled 40% of the nations 52,000 pattern agencies by exclusive contract. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), the manufacturers comprising the Guild sold 38% of all women's garments wholesaling at $6.75 and up and more than 60% of those at $10.75 and up. *Dictograph Products Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (C. A.

2, 1954), cert. denied 349 U. S. 940 (1955), involved exclusive dealing contracts tying up approximately 22% of the nation's 1,000 hearing aid distributors. The seller in *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (C. A. 7, 1954), had exclusive dealing contracts with 16 wholesalers including the two largest in Illinois and Iowa, which were the two largest markets for its products. While not indicating the total amounts and percentages of business involved the Court did note that *one* of Anchor's 32 competitors had made over $500,000 in sales to the Illinois and Iowa wholesalers over a three year period, which business it lost as a result of the exclusive dealing contracts of the seller. The Pullman Co., *United States* v. *Pullman Company*, 50 F. Supp. 123 (D. C. E. D. Pa., 1943), was the sole supplier in the United States of railroad sleeping cars and car service, and had maintained that position partially by the use of exclusive dealing contracts.

Only in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949), and *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (D. C. S. D. Cal., 1951), aff'd 343 U. S. 922 (1952), was the enormity of the seller's position in the market such as to be considered less than dominant. But even those cases present a situation much more aggravated than herein. In the *Standard Oil* case the seller had 8,000 exclusive dealing contracts with 16% of the independent service stations in a seven state area, although their sales constituted only 6.7% of the total gasoline sold. Furthermore, Standard's total sales constituted 23% of all the gasoline sold in the market. It was found in *Richfield* that 7,546 oral and written exclusive dealing contracts had been made by seller covering operations in six states and involving $43,173,000 in sales for the year 1950 alone.

Appendix A

Richfield was affirmed by the Supreme Court on the authority of *Standard Oil*. In this regard, it is important to note the interpretation of the *Standard Oil* decision by Justice Frankfurter, who wrote the opinion:

> In any event, in the Standard Oil case, we recognized the discrepancy in bargaining power [between seller and buyer] and pointed out that retailers might still insist on exclusive contracts if they wanted. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, dissent at 402.

The importance of disparity in bargaining power in anti-trust cases has been recognized by the Supreme Court. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611 (1953).

There was no inequality of bargaining power in this case. The seller was but one of 700 coal producers capable of serving the buyer, and was not shown to be of such size as to be capable of any economic coercion. The buyer has not been shown to have been capable of exerting any unreasonable demands in its own behalf. For all that appears, the contract was freely negotiated, and a fair reading of it gives one the impression that it was equitable to both parties in all material regards.

The seller would have the Court impose extra-judicial sanctions not provided by Congress to relieve it of its contractual obligations. If this is permitted without the utmost caution, the door may open wide to inconsequential allegations of anti-trust violations in every action on a contract of any substantial magnitude. While this might be good for anti-trust lawyers, it is doubtful whether it would be of much benefit to anyone else. It would cer-

tainly have a tendency to clog the courts with protracted litigation. Although this might put an end to anti-trust violations, it could, as Justice Jackson pointed out in *Bruce's Juices*,[9] have a devastating effect upon all business.

I would reverse the decision below.

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[9] 330 U. S. 743, 754 (1947).

APPENDIX B

No. 13,775

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAMPA ELECTRIC COMPANY, *Appellant*, v. NASHVILLE COAL COMPANY, NASHVILLE COAL, INC., and WEST KENTUCKY COAL COMPANY, *Appellees*.	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Divison.

JUDGMENT

(Filed April 4, 1960)

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ SHACKELFORD MILLER, JR.
United States Circuit Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
CIVIL ACTION NO. 2418

TAMPA ELECTRIC COMPANY,
Plaintiff,

v.

NASHVILLE COAL COMPANY, ET AL.
Defendants.

Received for Entry 11:15 A.M.
Nov 18 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS D. C.

OPINION

This is an action for a declaratory judgment seeking to establish that a certain contract referred to as the Potter-Tampa contract is valid and enforceable and binding upon both the plaintiff and the defendants.

The defendants, hereinafter sometimes referred to as the Seller, have moved the Court for summary judgment, contending that there are no issues of fact to be decided by the Court, and that the undisputed facts establish the illegality of the contract under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The plain-

tiff, Tampa Electric Company, hereinafter sometimes referred to as the Buyer, has also moved for summary judgment, insisting that the Potter-Tampa contract upon the basis of the undisputed facts is valid and enforceable. The Buyer is a large electric utility company serving Tampa, Florida, and its metropolitan area. Prior to the Potter-Tampa contract, oil was the only fuel used by the Buyer in its production of electric power. It is at present constructing a new plant or station near Tampa, known as the Gannon Station, which will eventually contain six separate power-producing units. Two of these units have been completed and are using coal as fuel, and a third coal-burning unit is under construction.

The contract in issue was made May 23, 1955 between the Tampa Electric Company and Justin Potter and David K. Wilson, co-partners doing business as the Potter Towing Company. After a series of transfers Nashville Coal Company, Inc., a wholly owned subsidiary of West Kentucky Coal Company, succeeded to the Potter-Wilson position under the contract. The West Kentucky Coal Company then made an agreement with Potter and Wilson to indemnify them against any loss resulting from nonperformance of the Potter-Tampa contract. After all transfers of the contract had been completed the Seller refused to perform on the ground that it was in violation of the Clayton and Sherman Acts, and subsequently the Buyer filed this action for declaratory judgment.

The terms of the Potter-Tampa contract are substantially as follows: The Seller agrees to provide the Buyer and the Buyer agrees to purchase from the Seller all the coal required as fuel for the production of electric energy at the Gannon Station for a period of 20 years. The first two units of the plant now in operation will use coal as

fuel, and as to these units "the full requirements shall not be less than 225,000 tons of coal per unit per year". It is agreed that a third unit now under construction will also use coal, and that all future units constructed will be supplied by the Seller if the Buyer elects to use coal as fuel. It is further stipulated that two years' notice will be given the Seller as to whether or not coal will be used in future units. The contract price is fixed at a minimum of $6.85, less a minimum rebate of 45 cents per ton for the first eighteen months and 30 cents per ton thereafter. There is no provision in the contract as to other plants now in operation or plants which might be constructed in the future, the contract applying only to the Gannon Station.

It is estimated by the Buyer that within a very few years the Gannon Station will consume more coal than is presently consumed in the entire State of Florida. Peninsular Florida's present coal consumption is approximately 700,000 tons per year as compared to the 450,000 tons required by the Potter-Tampa contract as a minimum for the first two units at the Gannon Station. The Buyer is presently purchasing coal for the first two units from Love and Amos Coal Company under a contract which is subject to cancellation on twelve months' notice by the Buyer, or subject to immediate cancellation should the Seller begin to perform under the Potter-Tampa contract.

It is the contention of the Seller that the Potter-Tampa contract is invalid under Section 3 of the Clayton Act in that it is an agreement or understanding not to purchase the product of the Seller's competitors and as such its effect is to substantially lessen competition. The relevant provisions of Section 3 are as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease

> or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

To sustain the validity of the contract the Buyer insists, first, that the Potter-Tampa contract does not fall within the scope of Section 3 in that it does not have the effect of requiring that the purchaser shall not use the goods of a competitor of the Seller. In support of this argument it is pointed out that the Buyer, consistently with the Potter-Tampa contract, may use oil as a fuel in the remaining three units at the Gannon Station, and that it may use the coal of a competitor of the Seller in any future plant to be constructed and in any present oil-burning plant converted to the use of coal. However, in the present case the Court is persuaded that the Potter-Tampa contract is a requirements contract having the effect of requiring the Buyer not to use the goods of a competitor of the Seller within the intent and meaning of Section 3. It clearly provides, in effect, that the Buyer must buy only from the Seller all of its coal for the two units now in operation and for the additional unit now under construction at the Gannon Station, representing in fact all of the Buyer's present coal requirements. According to the Buyer's estimation, it will require 1,000,000 tons of coal per year at the Gannon Station by 1961. A con-

tract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute. The question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. It is true that coal could conceivably be used in future plants or by converting existing plants, but there is no evidence that this is presently planned. While the possibilities suggested do exist the unalterable fact remains that the contract at issue is one which "pre-empts" or "engrosses" all of the known coal requirements of the Buyer—manifestly a large and substantial volume of commerce—for a period of 20 years.

This conclusion as to the effect of the contract under the Clayton Act is supported by the decision of the Supreme Court in International Salt Co., Inc. v. United States, 332 U. S. 392, 60 S. Ct. 12, 91 L. Ed. 20, in which the International Salt Company required tying arrangements wherein the lessees of its patented machines could use only salt purchased from the lessor. In the year 1944 the company sold approximately 119,000 tons of salt for about $500,000 for use in its leased machines. The tying clause in practically all of its leases required the lessee to purchase from the lessor all unpatented salt and salt tablets consumed in the leased machines. The Government moved for summary judgment which was sustained by the trial court. On appeal the International Salt Company insisted that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. In rejecting this

argument and in holding that the tying agreements were illegal the Court stated:

> "We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, per se, United States v. Socony-Vacuum Oil Co., 310 U. S. 150; United States v. Trenton Potteries Co., 273 U. S. 392, but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." (332 U. S. p. 396)

It was regarded as immaterial by the Court that the leases provided that if competitors offered salt of an equal grade at a lower price the lessee should be free to buy in the open market unless the lessor would furnish the salt at an equal price, and further that the lessee was entitled to any benefit of any general price reduction in the lessor's salt tablets. It was found that these provisions, while affording some measure of protection to the lessee, did not avoid "the stifling effect of the agreement on competition". Thus the decision would appear to stand for the proposition that a violation of Section 3 occurs if a substantial amount of business is removed from the area of competition even though there remains the possibility of use of a competitor's product.

Appendix C

Other decisions are to the same effect, i.e., that the possibility that a buyer might use a competitor's product does not exempt exclusive contractual arrangements from the condemnation of the Clayton Act. Judson L. Thomson Mfg. Co. v. Federal Trade Commission, 1st Cir. 150 F. 2d 952, cert. denied, 326 U. S. 776, 66 S. Ct. 267, 90 L. Ed. 469; Signode Steel Strapping Co. v. Federal Trade Commission, 4 Cir. 132 F. 2d 48. The case of Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746, relied on by the Buyer, is deemed to be distinguishable because the lease involved left the buyer "free to buy wherever he chooses", or "to discontinue any or all" dealings with the Seller, whereas in the present case the Buyer is committed for a period of 20 years to purchase from one Seller alone all coal consumed at one of its major plants.

The undisputed facts establish that the Gannon Plant's coal requirements will soon exceed in fuel equivalent all of the oil burned at the Buyer's other two plants. It is estimated that after 1961 the Buyer's coal requirements will increase as required to about 2,250,000 tons per year. Under the terms of the Potter-Tampa contract the Seller, alone, would have the opportunity to furnish this large amount of coal to the Buyer.

The Buyer's argument that the Potter-Tampa contract is not a requirements contract because coal competes with other fuel is not only contrary to the express language of Section 3, but it is also untenable when the decisions construing Section 3 are considered. It is true that oil is the fuel used in all plants operated by the Buyer other than the Gannon Station, and that oil could be used in the last three units to be built at the Gannon Station. But this fact becomes immaterial in view of the express

language of Section 3 that an exclusionary agreement is unlawful where its effect may be to substantially lessen competition "in any line of commerce".

Although both oil and coal are fuels, each is a separate and distinct line of commerce. Thus it was held in George Van Camp & Sons Co. v. American Can Company, et al., 273 U. S. 245, 253, 49 S. Ct. 112, 73 L. Ed. 311, with reference to another section of the Clayton Act using identical language:

> "The phrase is comprehensive and means that if the forbidden effect or tendency is produced in one out of all the various lines of commerce the words 'in any line of commerce' literally are satisfied."

And in United States v. E. I. duPont de Nemours & Co., et al., 353 U. S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057, the Supreme Court in ruling that automotive finishes and fabrics were a separate line of commerce from other similar materials, stated:

> "* * * automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."

The Buyer further argues that the Potter-Tampa contract not only did not stifle or lessen competition but actually stimulated or increased it by introducing coal to Peninsular Florida and breaking the oil monopoly. It is pointed out that on the basis of the most recent figures at the time the contract was entered into coal accounted for less than 6 per cent of the fuel consumed in the entire state of Florida, and that every power-generating unit in Peninsular Florida burned oil in its boilers. It is said

that discounting the Panhandle of Florida where all of the natural gas is consumed Peninsular Florida has been monopolized by oil. It is further argued that until coal was first burned in the units at Gannon Station a year ago there was virtually no challenge to oil's stranglehold in Peninsular Florida, and that this contract, therefore, created competition where none had existed before. Conceding that coal is a newcomer to the Florida market and that its use by the Tampa Electric Company might stimulate the market and induce other consumers to convert to coal, the Court is of the opinion that this possibility does not save the contract in issue from illegality under Section 3 of the Clayton Act. Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. In that case the Standard Oil Company had made numerous contracts with independent dealers to supply their full requirements for certain "Standard" products for a period of six months. There was no evidence that competition had actually decreased, but the Court held that Section 3 of the Clayton Act did not require such proof in order to establish a violation of its terms. In this connection it was stated:

> "• • • To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out • • •" (337 U. S. p. 311).

The Court then concluded:

> "We conclude, therefore, that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gain-

> said that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of Section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity" (337 U. S. p. 314).

A similar situation exists in the present case, there being no direct evidence that competition would actually decrease as a result of performance of the contract. It is conceivable that competition might increase due to the introduction of a product into a comparatively new market. But the inescapable fact persists that the Potter-Tampa contract for a period of 20 years excludes competitors of the Seller from a substantial amount of trade, although as the plaintiff asserts, the Seller was only one of 700 coal producers who could serve the same market. The contract is exclusionary to such a degree and the volume of commerce affected is manifestly so large that there is no escape from the conclusion that its effect under the circumstances disclosed is to "probably lessen competition or create an actual tendency to monopoly", to use the words of the Supreme Court in Standard Fashion Company v. Magrane-Houston Co., 258 U. S. 346, 357, 42 S. Ct. 360, 66 L. Ed. 653, language re-approved in Standard Oil Company of California v. United States, supra.

Appendix C

One reason for rejecting the argument in Standard Oil that actual lessening of competition must be shown was the difficulty which the courts would encounter in adopting a proper standard of proof for such cases. It was observed that "to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."

It is vigorously argued by the plaintiff that the Clayton Act does not apply to a requirements contract when the seller does not occupy a sufficiently powerful position in the market to enable him to assert "leverage" over the buyer. This argument is stated in the plaintiff's brief as follows:

> "Even assuming that the contract at issue required plaintiff to purchase all of its fuel requirements from the defendants for a period of twenty years there is nothing in the anti-trust laws themselves nor in any case construing them which would outlaw the contract. It is abundantly clear from an examination of the legislative history of Section 3 of the Clayton Act as well as the cases applying that section to so-called 'requirements contracts', that the sole evil sought to be prohibited was a practice, very prevalent when the Clayton Act was adopted in 1914, whereby a seller who, by means of the economic leverage arising from a patent or from substantial economic control of a unique and desirable article, tied up a substantial portion of the retail or manufacturing market by requiring retail dealers or manufacturers who wished to deal in his particular goods or utilize his patent to agree not to deal in the goods of a competitor. Clearly the contract here in issue bears no resemblance whatever to such agreements."

But here also it would appear that the plaintiff's argument is repelled by the decision in Standard Oil Company of California, supra. In referring to market dominance the court in that case held that the requirements contracts violated Section 3, even though:

> "• • • Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find • • •". (337 U. S. p. 302)

Times-Picayune Publishing Co. et al. v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277, held that both proof of dominance in the market for the tying product and a showing that an appreciable volume of business in the tied product is restrained are essential conditions to judicial condemnation of a tying clause as a per se violation of the Sherman Act. But in the same case the court made it clear in its opinion that under the narrower standards of Section 3 of the Clayton Act either proof of market dominance or proof of restraint of a substantial volume of commerce would suffice to establish a violation. Thus, the court stated:

> "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." (345 U. S. p. 608)

The same distinction between the Sherman Act and the more limited and particularized provisions of the Clayton Act is to be borne in mind in considering Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545. The language of the court with respect to monopoly power or market dominance or control is limited to the facts of the case before the Court involving a tying agreement which was alleged to constitute an unreasonable restraint of trade under the general provisions of Section 1 of the Sherman Act. A Section 3 Clayton Act violation was neither claimed nor considered.

The wording of the statute itself lends no support to the argument that economic leverage or market dominance is a prerequisite to its violation and for this reason the effort to rely upon the legislative history of the Clayton Act would appear to be futile. The Court is of the opinion that the rationale of the court in Standard Fashion Company v. Magrane-Houston Co., supra, is applicable. In that case the court, in speaking of the legislative history of the Clayton Act, stated:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." (258 U. S. p. 356)

Nor is there any merit in the plaintiff's contention that the Clayton Act applies only to instances where numerous contracts with various dealers are involved and not to a case of a single seller and a single buyer. This position is not sustained by authority and no support can

be found for it in the language or the purpose of the statute. Both language and purpose would be ignored if multiple buyers or sellers were held to be necessary to its violation.

The final contention of the plaintiff that Section 3 should not be applied where the buyer desires that the contract be performed is also without substance. The illegality of the contract under Section 3 renders it unenforceable at the suit of either party. In National Transformer Corp., et al. v. France Mfg. Co., 6 Cir. 215 F. 2d 343, 361, the court said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all relief is refused because of the public interest * * *. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong * * *. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

It may be conceded that there are doubtless economic benefits inherent in the use of a requirements contract of this type, and that it seems somewhat harsh to invalidate such a contract, particularly when entered into by the parties of their own free will, in the evident belief that it was mutually advantageous, and without compulsion or constraint. But the Court's function is not to determine whether the contract is advantageous or desirable from the standpoint of the parties or of the public but whether it is legal. Under the circumstances of this record the two essential conditions are shown to invalidate the contract under Section 3 of the Clayton Act regardless of its

merits or beneficial effects otherwise: First, the contract within the sense and meaning of Section 3 is one requiring the buyer not to use or deal in the goods of a competitor of the seller; and Second, the effect of the contract is to substantially lessen competition in a line of commerce. Since the Court is of the view that the contract is so condemned, its status under the Sherman Act need not be determined.

As the material facts shown by the pleadings, affidavits, and other pertinent papers, are not in dispute and no genuine issue of fact is involved, it follows that the defendant's motion for a summary judgment should be sustained and the plaintiff's similar motion overruled.

An appropriate form of judgment will be passed to the Court to implement this opinion declaring the rights of the parties accordingly.

(s) WILLIAM E. MILLER
United States District Judge

APPENDIX D

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
CIVIL ACTION NO. 2418

TAMPA ELECTRIC COMPANY,
Plaintiff,
v.
NASHVILLE COAL COMPANY, ET AL.,
Defendants.

Received for Entry 9:15 AM
Dec 4 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS

FINAL JUDGMENT

The complaint in this action having prayed for a judgment declaring that a certain described contract for the sale of goods to plaintiff, entered into on May 23, 1955, and thereafter supplemented and amended on September 21, 1955 and February 8, 1956, in respect of which the defendants had succeeded to the rights and obligations of the original seller, "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms"; and

Defendants having filed their answer, alleging that the said contract "is illegal, void and unenforceable", due to

its violation of the antitrust laws of the United States, and praying that the complaint be dismissed with prejudice; and

A motion and cross-motion for summary judgment under Rule 56, together with supporting affidavits and memoranda of law, having been respectively filed by defendants and plaintiff, wherein the parties asserted and agreed that there was no genuine issue between them as to any material fact; and

Oral argument on said motions having been heard by the Court on July 31, 1958, following which additional memoranda were filed by both parties and an additional affidavit was filed by plaintiff; and

The Court having considered all pleadings, affidavits and memoranda filed herein, and having found from the parties' undisputed allegations of fact, and their uncontroverted sworn statements of fact, and also from their admissions of fact (including admissions of fact disclosed in their memoranda), that there is no genuine issue between them as to any material fact and no disputed or controversial question of fact to be submitted for trial; and

The Court having decided, upon the basis of the findings of fact and conclusions of law set forth in its opinion, filed herein November 18, 1958, that defendants are entitled to judgment as a matter of law;

IT IS HEREBY ORDERED, DECLARED, ADJUDGED AND DECREED:

1. The contract of May 23, 1955, as supplemented and amended, between the plaintiff, an original party thereto, and the defendants, as successors to the rights and obligations thereunder of Justin Potter and David K. Wilson, co-partners doing business as Potter Towing Company, is

in violation of Section 3 of the Act of Congress approved October 15, 1914, commonly known as the Clayton Act, 15 U. S. C. §14, in that, within the meaning of that Act, it requires a purchaser of goods not to use or deal in the goods of a competitor of the seller and has the effect of substantially lessening competition in a line of commerce.

2. By reason of its aforesaid violation of the Clayton Act, said contract is illegal, void and unenforceable.

3. Plaintiff has no cause of action, and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract or of the failure, neglect or refusal of any or all of the defendants to perform any acts or undertakings in respect of said contract.

4. Plaintiff's complaint for declaratory judgment and this action be and they are hereby finally dismissed on the merits and with prejudice.

5. Defendants are entitled to have and recover from plaintiff their costs in this action and to have execution therefor.

WM. E. MILLER
United States District Judge

Entered Dec. 4, 1958.

Consented to as to form:

WINTHROP, STIMSON, PUTNAM & ROBERTS
HOOKER, KEEBLE, DOBSON & HARRIS
Attorneys for Plaintiff

ARNOLD, FORTAS & PORTER
BASS, BERRY & SIMS
Attorneys for Defendants

APPENDIX E

EXCERPTS FROM STATUTORY HISTORY PERTAINING TO SECTION 3 OF THE CLAYTON ACT.

In its Analysis of the Bill, the House Report [H.R. Rep. No. 627, 63rd Cong., 2d Sess. (May 6, 1914)], which was incorporated into the Senate Report [S. Rep. No. 698, 63rd Cong., 2d Sess. (July 22, 1914)], considered the effect of Section 3 of the Clayton Act and at length spoke of the evils sought to be condemned:*

> "* * * Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer

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* Section 3 as finally enacted was an amended version of Section 4 of the bill as originally passed by the House of Representatives, and, at that time, read as follows:

> "That any person engaged in commerce who shall lease or make a sale of goods * * * on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court." H. R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (May 6, 1914).

Before its enactment as Section 3 the criminal sanctions were stricken and the qualifying clause "where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" was added. Otherwise, the language is substantially the same.

and to the community and as monopolistic in its effects. • • •

"• • • Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. • • •

"• • • The system is wholly bad for consumers and the general public, and in its last analysis detrimental to the interests of local dealers generally. We have penalized this practice under the provisions of section 4 [now section 3] and made it a misdemeanor punishable as prescribed in the section." H. R. Rep. No. 627, 63rd Cong., 2d Sess., 10-13 (1914).

Appendix E

Congressman Webb, a member of the House Committee on the Judiciary, to which the bill had been referred, after outlining the bill to the House of Representatives, described its purpose as follows:

> "• • • I contend, Mr. Chairman, that no one has the right to sell goods to a purchaser and receive his money for them and at the same time compel such purchaser to refuse to sell a competitive article. Such contract in itself is in restraint of trade and tends directly to monopoly. This practice has been in vogue in the United States for 20 years, and there is scarcely a retail merchant throughout this broad land who has not suffered from such practice, because our country has been literally plastered with these exclusive-sale contracts. • • •" 51 Cong. Rec. 9072 (May 22, 1914).

Congressman Webb later amplified this view:

> "It means simply this, that if I am a manufacturer or a wholesaler, and go to a small town and pick out the most popular merchant in that town —I have advertised my goods well—and, of course, naturally he is anxious to buy them. I go to this most popular merchant and tell him that I will let him buy my goods, provided he will not sell or carry in stock any of my competitor's goods. Now, I do not know how other gentlemen may look at such a contract, but that contract, in my opinion, is in and of itself a contract in restraint of trade. • • •" 51 Cong. Rec. 9406 (May 28, 1914).

• • •

> "• • • I do not believe there is a man on either side of the House who will say that it is right or

fair business for a manufacturer to make a contract with the merchant to sell only his goods and that he shall not sell goods that compete with his. It ought not to be allowed." 51 Cong. Rec. 9407 (May 28, 1914).

* * *

"It prevents the manufacturer from going to a little or big merchant and selling goods to him on condition that the merchant shall sell only his goods and not sell the goods of any competitor, and I ask both Republicans and Democrats on the floor of this House to give their support to that proposition, because it is good business morals, and it is a long step toward unfettering the little business man all over the country, and it will make the little country merchant feel that he can furnish supplies of all sorts and varieties to his customers instead of forcing them to go to the big mail-order houses to get what they want because they can not find the goods on the shelves of their local merchant." 51 Cong. Rec. 9407 (May 28, 1914).

Congressman Floyd, also a member of the House Judiciary Committee, stated:

"* * * The object of this section is to break up the power of giant monopoly and to liberate and free every small dealer in this land and put him in a position of independence in which he can do business in competition with any other business man in this country. * * *" 51 Cong. Rec. 9160 (May 23, 1914).

He described the practice sought to be outlawed by then Section 4 of the Clayton Act:

"* * * That is, a manufacturer goes to a merchant in town and agrees with him that if he will handle his goods exclusively and enter into a contract that

> he will not handle the goods of any other competitor in his line of business he will sell him the goods at a lower price and will give him a rebate at the end of a certain time or take back the remnant of the goods if he fails to sell them, exacting of the purchaser full payment for the goods, and then refusing to allow him to sell in that store the commodities of any competitor." 51 Cong. Rec. 9161 (May 23, 1914).

Congressman Taggert, who also was a member of the House Judiciary Committee, declared:

> "Section 4 of the bill will afford relief to retail dealers, who are now required by wholesalers to handle certain articles exclusively and become sole agents for certain goods * * *." 51 Cong. Rec. 9198 (May 25, 1914).

Senator Reed, a member of the Senate Committee on the Judiciary, to which the Senate bill had been referred, stated:

> "* * * What the bill aims at is the case of a vendor of goods, selling them to a dealer upon the express provision, not that the dealer will handle his goods, but that the dealer will not handle anybody else's goods, thus depriving the public of the opportunity to buy both classes of goods over the same counter and in actual competition, and also depriving the dealer of his opportunity to buy in the open market and from whomsoever he pleases." 51 Cong. Rec. 14270 (August 26, 1914). See also 51 Cong. Rec. 14226 (August 25, 1914).

* * *

In the hearings before the House Committee on the Judiciary, on February 26, 1914, Herbert Noble, an attorney, addressed the Committee on behalf of his client,

Appendix E

John A. Roebling Sons Co., bridge builders who were also manufacturers of wire rope. Mr. Noble expressed concern lest Section 3 should be construed to ban the wire rope requirements contracts Roebling had made with sundry industrial consumers. With Representative Clayton presiding in the Chair, Representative Charles C. Carlin of Virginia, a member of the Judiciary Committee, replied to Mr. Noble's queries as follows:

> "Mr. Carlin: I do not think this statute covers that.
>
> "Mr. Noble: It says you may not make an exclusive contract to buy all your goods from one man.
>
> "Mr. Carlin: No; it does not. It simply says a man shall not require you to make an exclusive contract to sell his goods only.
>
> * * * *
>
> "Mr. Noble: Do you mean the word 'dealing' only refers to jobbers and not to consumers?
>
> "Mr. Carlin: That statute has no reference to consumers. It is intended to apply to merchants generally. * * *" Hearings before the Committee on the Judiciary of the House of Representatives on the Clayton Bill, 63rd Cong., 2d Sess., 966-67 (1914).